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SIA HIONG TEE & ORS v. CHONG SU KONG & ORS

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
B
HASAN LAH FCJ
MOHAMED APANDI ALI FCJ
[CIVIL APPEAL NO: 02(f)-101-12-2012(S)]
6 APRIL 2015

C ***LAND LAW:*** *Indefeasibility of title and interests – Forged transfer – Whether bona fide purchasers for value without notice obtained good title to land immediately upon registration of transfer under s. 88 of Land Ordinance (Sabah) (Cap 68) – Whether s. 88 incorporated concept of indefeasibility of title as found in s. 340 of National Land Code*

D ***LAND LAW:*** *Transfer – Validity of – Invalid or void instrument of transfer – Bona fide purchasers for value without notice – Whether common law rule of nemo dat quod non habet applicable – Whether being a bona fide purchaser for value without notice was sufficient to avoid nemo dat rule – Whether purchasers obtained good title to land*

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The respondents were the registered owners of a piece of land. The custody of the title deed of the land was with the second respondent until it was given to the seventh respondent allegedly for valuation purpose. The seventh respondent gave the title deed to one Ling for valuation purposes but the title deed was never returned to the seventh respondent. It was discovered later F that the appellants had became the registered owners by virtue of a sale and purchase agreement ('SPA') with the seventh respondent signing for himself and on behalf of the first to sixth respondents pursuant to a power of attorney which the first to sixth respondents had allegedly given to the seventh respondent. However, the respondents contended that their signatures in the G SPA, the power of attorney, the memorandum of transfer and Form PDS15 were forged. The respondents therefore claimed, among others, for an order that the transfer of the land effected under the memorandum of transfer be set aside and annulled on the ground of forgery. The appellants, on the other hand, averred that they were *bona fide* purchaser for value without notice. H The High Court Judge allowed the respondents' claim. On appeal by the appellants, the Court of Appeal ruled that the title of the appellants was defeasible on the basis that the power of attorney that was used as authority to transfer the said land to the appellants was a forged instrument even though the land had been registered in the name of the appellants. The Court of I Appeal therefore held that the appellants could not have acquired a valid title to the land. The appellants were granted leave to appeal against the decision of the Court of Appeal on the following questions of law: (i) whether *bona fide* purchasers for value and without notice, obtained good title to land

immediately upon registration of the transfer under s. 88 of the Land Ordinance (Sabah) (Cap 68) ('SLO') and therefore had an indefeasible registered interest in land; and (ii) whether the concept of deferred indefeasibility as adopted in *Tan Yin Hong v. Tan Sian San & Ors* which was a case based on s. 340 of the National Land Code ('NLC') should be distinguished from the interpretation of s. 88 of the SLO since there was no similar provision in the SLO.

Held (dismissing appeal with costs)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) Section 340 of the NLC introduced the concept of indefeasibility of title following the Torrens system wherein, s. 340(1) sets out the general principle that the proprietor in whose favour registration has been effected will obtain an indefeasible title to or interest in the land. However, the indefeasibility of title or interest so acquired under s. 340(1) is liable to be set aside under s. 340(2) where it has been obtained by, *inter alia*, fraud or forgery. Thus, the title is subject to challenge and can be defeated although the proprietor or transferee acted in good faith in acquiring the title or interest. (paras 26 & 27)

(2) Where the title or interest is subsequently transferred, s. 340(3) provides that the subsequent proprietor or transferee will similarly obtain a defeasible title or interest. However, where the subsequent proprietor or transferee acts in good faith and gives valuable consideration for the title or interest in question, the proviso to s. 340(3) confers protection on such a subsequent proprietor or transferee such that his title or interest will be indefeasible. In effect s. 340 introduces the concept of deferred indefeasibility. (para 28)

(3) Section 88 of the SLO on the other hand, does not incorporate the concept of indefeasibility of title as found in s. 340 of the NLC. Section 88 of the SLO merely deals with the registration of new title, dealing with claim to or interest in any land, other than land held under native customary tenure without documentary title. It requires such title or dealing, etc. to be registered for it to be valid under the SLO. Registration under the SLO does not confer indefeasibility of title, deferred or immediate. In the absence of statutory intervention in the like of the proviso to s. 340(3), there is no protection afforded to the *bona fide* purchaser for value without notice such as the appellants in the present case. (paras 30 & 31)

(4) The instrument of transfer in the present case was an invalid or void instrument of transfer as it was executed on the authority of a forged power of attorney. Therefore, it could not give rise to a valid title in law and the SLO does not seek to give validity to such a title even though the appellants were *bona fide* purchasers for value without notice. There is nothing in the SLO giving protection to such purchasers. (para 33)

(5) The finding by the Court of Appeal found support in the common law rule of *nemo dat quod non habet ('nemo dat rule'),* which literally means 'no one can transfer what he has not got'. Applying the *nemo dat rule* to the present case, the forgers could not pass good title to the appellants. Thus, a mere claim of being a *bona fide* purchaser for value without notice was not sufficient to avoid the application of the *nemo dat rule* which rendered the appellants' title to the land liable to be set aside at the instance of the respondents who are the rightful owners. Therefore, the first question was answered in the negative. (paras 35 & 36)

(6) Section 340 of the NLC and s. 88 of the SLO are two different provisions. The appellants were the immediate holder of the title which was obtained by or under a forged instrument of transfer. Therefore, their title was open to challenge and be set aside at the instance of the respondents who were the true owners. It was thus erroneous to interpret s. 88 of the SLO as to confer upon *bona fide* purchaser for value without notice, an indefeasible title or interest in the land, upon registration. The second question was thus answered in the affirmative. (paras 37 & 38)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden adalah pemilik berdaftar sebidang tanah. Surat ikatan hak milik tanah tersebut disimpan oleh responden kedua sehingga ia diberikan kepada responden ketujuh dikatakan untuk tujuan penilaian. Responden ketujuh memberikan surat ikatan hak milik tersebut kepada seorang yang bernama Ling bagi tujuan penilaian tetapi surat ikatan hak milik tersebut tidak pernah dipulangkan kepada responden ketujuh. Selang beberapa lama, didapati bahawa perayu-perayu telah menjadi pemilik berdaftar melalui satu perjanjian jual beli ('PJB') dengan responden ketujuh menandatangani bagi dirinya dan bagi pihak responden pertama hingga keenam berikutan surat kuasa wakil yang kononnya diberikan oleh responden pertama hingga keenam kepada responden ketujuh. Walau bagaimanapun, responden-responden menghujahkan bahawa tandatangan mereka dalam PJB, surat kuasa wakil, memorandum pindah milik dan Borang PDS15 adalah palsu. Responden-responden oleh itu memohon, antara lain, bagi satu perintah bahawa pindah milik tanah yang dibuat melalui memorandum pindah milik diketepikan dan dibatalkan atas alasan pemalsuan. Sebaliknya, perayu-perayu menghujahkan bahawa mereka tidak mengetahui tentang apa-apa pemalsuan berkaitan dengan pindah milik tanah yang dibuat di bawah memorandum pindah milik dan menyatakan bahawa mereka adalah pembeli *bona fide* bagi nilai tanpa notis. Mahkamah Tinggi membenarkan tuntutan responden-responden. Atas rayuan oleh perayu-perayu, Mahkamah Rayuan memutuskan bahawa hak milik perayu-perayu boleh disangkal atas alasan bahawa surat kuasa wakil yang digunakan sebagai autoriti untuk pindah milik tanah tersebut adalah instrumen palsu walaupun tanah tersebut telah didaftarkan atas nama perayu-perayu. Mahkamah

Rayuan, oleh itu, memutuskan bahawa perayu-perayu tidak mungkin memperoleh hak milik sah bagi tanah tersebut. Perayu-perayu diberikan kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan atas persoalan undang-undang seperti berikut: (i) sama ada pembeli *bona fide* bagi nilai dan tanpa notis, memperoleh hak milik yang sah bagi tanah sebaik sahaja pendaftaran pindah milik di bawah s. 88 Ordinan Tanah (Sabah) (Bab 68) ('SLO') dan oleh itu memperoleh kepentingan berdaftar yang tidak boleh sangkal dalam tanah tersebut; dan (ii) sama ada konsep tidak boleh sangkal tertunda seperti yang digunakan dalam kes *Tan Yin Hong v. Tan Sian San & Ors* yang merupakan suatu kes berasaskan s. 340 Kanun Tanah Negara ('KTN') wajar dibezakan daripada tafsiran s. 88 SLO kerana tidak ada peruntukan serupa dalam SLO.

Diputuskan (menolak rayuan dengan kos)
Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Seksyen 340 KTN memperkenalkan konsep hak milik tidak boleh sangkal menurut sistem Torrens di mana, s. 340(1) menyatakan prinsip am bahawa pemilik yang mana pendaftaran telah dibuat bagi pihaknya, akan memperoleh hak milik tidak boleh sangkal atau kepentingan dalam tanah. Walau bagaimanapun, hak milik tidak boleh sangkal atau kepentingan yang diperoleh di bawah s. 340(1) tersebut boleh diketepikan di bawah s. 340(2) jika ia diperoleh melalui, antara lain, frod atau pemalsuan. Oleh itu, hak milik tersebut tertakluk kepada cabaran dan boleh dipatahkan walaupun pemilik atau penerima pindahan bertindak dengan niat baik dalam memperoleh hak milik atau kepentingan tersebut.

(2) Apabila hak milik atau kepentingan tersebut dipindahkan selanjutnya, s. 340(3) memperuntukkan bahawa pemilik atau penerima pindahan terkemudian akan turut menerima hak milik atau kepentingan boleh sangkal. Walau bagaimanapun, apabila pemilik atau penerima pindahan terkemudian bertindak dengan niat baik dan memberikan balasan yang bernilai bagi hak milik atau kepentingan yang dipersoalkan, proviso kepada s. 340(3) memperuntukkan perlindungan bagi pemilik atau penerima pindahan selanjutnya di mana hak milik atau kepentingannya akan menjadi tidak boleh sangkal. Sebenarnya, s. 340 memperkenalkan konsep tidak boleh sangkal tertunda.

(3) Sebaliknya, s. 88 SLO tidak memasukkan konsep hak milik tidak boleh sangkal seperti yang didapati dalam s. 340 KTN. Seksyen 88 SLO hanya memperuntukkan bagi pendaftaran hak milik baru, yang berkaitan dengan tuntutan kepada atau kepentingan dalam mana-mana tanah, selain daripada tanah yang dipegang di bawah pemegangan adat anak negeri tanpa dokumen hak milik. Ia memerlukan hak milik atau urusan sedemikian, dan lain-lain, didaftarkan supaya ia sah di bawah SLO. Pendaftaran di bawah SLO tidak memberikan hak milik tidak boleh

A sangkal, sama ada tertunda atau segera. Tanpa campur tangan statutori seperti yang terdapat dalam proviso kepada s. 340(3), tidak ada perlindungan yang diberikan kepada pembeli *bona fide* bagi nilai dan tanpa notis seperti perayu-perayu dalam kes ini.

B **(4)** Instrumen pindah milik dalam kes ini tidak sah atau instrumen pindah milik yang terbatal kerana ia dimeterai berasaskan kepada hak surat kuasa wakil yang dipalsukan. Oleh itu, ia tidak boleh membentuk hak milik sah di sisi undang-undang dan SLO tidak boleh mengesahkan hak milik sedemikian walaupun perayu-perayu adalah pembeli *bona fide* bagi nilai dan tanpa notis. Tiada apa-apa dalam SLO yang memberikan C perlindungan kepada pembeli-pembeli sedemikian.

(5) Dapatan Mahkamah Rayuan disokong oleh kaedah common law *'nemo dat quod non habet'* ('kaedah *nemo dat*'), yang secara harfiah bermaksud 'seseorang tidak boleh memindahkan apa yang tidak dimilikinya'. Mengguna pakai kaedah *nemo dat* kepada kes ini, pemalsu-pemalsu D tersebut tidak boleh memindahkan hak milik sah kepada perayu-perayu. Oleh itu, tuntutan semata-mata sebagai pembeli *bona fid*e bagi nilai dan tanpa notis adalah tidak mencukupi untuk mengelak pemakaian kaedah *nemo dat* yang menyebabkan hak milik perayu-perayu kepada tanah tersebut boleh diketepikan oleh responden-responden yang merupakan E pemilik-pemilik sah. Oleh itu, soalan pertama dijawab secara negatif.

(6) Seksyen 340 KTN dan s. 88 SLO adalah dua peruntukan berbeza. Perayu-perayu adalah pemegang hak milik yang diperoleh melalui atau di bawah instrumen pindah milik yang dipalsukan. Oleh itu, hak milik mereka boleh dicabar dan diketepikan oleh responden-responden yang F merupakan pemilik-pemilik sebenar. Oleh itu, adalah salah untuk mentafsir s. 88 SLO untuk memberikan kepada pembeli *bona fide* bagi nilai dan tanpa notis, hak milik atau kepentingan tidak boleh sangkal dalam tanah, atas pendaftaran. Soalan kedua, oleh itu, dijawab secara afirmatif.

G **Case(s) referred to:**

Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd [1949] 1 KB 322 ***(refd)***

Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC H ***(refd)***

Breskvar v. Wall [1971] HCA 70; 126 CLR 376 ***(refd)***

Frazer v. Walker [1967] 1 All ER 649 ***(refd)***

Gibbs v. Messer [1891] AC 248 ***(refd)***

M & J Frozen Food Sdn Bhd v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

Ngui Yu Thau v. Wong Mu Khyun & Ors (No 2) [2003] 6 CLJ 273 HC ***(refd)***

I *Tan Sri William Cheng Heng Jem & Anor v. Tan Sri Ngan Ching Wen & Ors [2012] 1 LNS 1196 HC* ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:
Land Code (Cap 81) (Sarawak), s. 31
Land Ordinance (Cap 68) (Sabah), s. 88
National Land Code, ss. 5, 340(1), (2)(a), (b), (3)
Sale of Goods Act 1957, s. 27(1)

For the appellants - Grace Chaw Hei Hei; M/s Grace Chaw & Co
For the respondents - Roland Cheng; M/s Roland Cheng & Co

Reported by S Barathi

JUDGMENT

Arifin Zakaria CJ:

Introduction

[1] This is an appeal by the appellants (the defendants in the High Court) against the decision of the Court of Appeal in affirming the decision of the High Court. The Court of Appeal ruled that the title of the appellants is defeasible on the basis that the power of attorney that was used as authority to transfer the said land to the appellants is a forged instrument even though the land in question had been registered in the name of the appellants. That being the case, the Court of Appeal held that the appellants could not have acquired a valid title to the land.

Leave To Appeal

[2] This court had, on 5 December 2012, granted leave to the appellants to appeal against the decision of the Court of Appeal on the following questions of law:

(i) Whether *bona fide* purchasers for value and without notice, obtained good title to land immediately upon registration of the transfer under section 88 of the Land Ordinance (Sabah Cap 68) ("Land Ordinance") and is therefore an indefeasible registered interest in Land?; and,

(ii) Whether the concept of deferred indefeasibility as adopted in *Tan Yin Hong v. Tan Sian San & Ors* (2010) 2 CLJ 269 which was a case based on s. 340 of the National Land Code should be distinguished from the interpretation of section 88 of the Land Ordinance since there is no similar provision in the Land Ordinance?

Background Facts

[3] The background facts of the case are these. The respondents (plaintiffs in the High Court) were the registered owners of a piece of land held under CL015029213 measuring 25 acres located in the District of Menggatal, Kota Kinabalu (hereinafter referred to as "the land"). The custody of the title deed of the land was with the second respondent (now deceased) until it was given to the seventh respondent allegedly for valuation purposes. It is not disputed that the seventh respondent had intended to sell the land and for that purpose

A he informed one Tong Chung Hing (Tong) that he may be agreeable to a sale price of RM2.53 million. Tong later informed the seventh respondent that a certain Mr Ling was interested to purchase the land for RM2.53 million and is willing to pay in cash after Mr Ling had seen the original title and had valued the land. Upon the request of Tong, the seventh respondent gave the
B title deed to the land to Mr Ling for valuation purposes but the title deed was never returned to the seventh respondent. It was discovered later that the appellants had become the registered owners by virtue of a sale and purchase agreement dated 19 March 2004 with the seventh respondent signing for himself and on behalf of the first to sixth respondents pursuant to a power
C of attorney which the first to sixth respondents had allegedly given to the seventh respondent. The respondents contended that their signatures in the sale and purchase agreement dated 12 February 2004, the power of attorney dated 19 March 2004, the memorandum of transfer dated 25 March 2004 and Form PDS 15 were forged.

D **Proceedings In The High Court**

[4] In their claim, the respondents asked for, among others: an order that the transfer of the land effected under the memorandum of transfer dated 25 March 2004 to the first to fourth appellants be set aside and annulled on the ground of forgery; an order directing the fifth defendant (the Assistant
E Collector of Land Revenue, Kota Kinabalu) to expunge from the register and records at the central land office the registration of the transfer dated 25 March 2004 and any other dealings effected by the first to fourth appellants after 25 March 2004; and, a declaration that the respondents are the registered co-owner of the land on 25 March 2004.

F **[5]** In opposing the claim, the appellants averred that they were not aware of any forgery in relation to the transfer of the land effected under the memorandum of transfer dated 25 March 2004 and claimed that they were *bona fide* purchasers for value without notice. The appellants also filed a claim against the third party ie, a legal firm named Messrs Johari & Zelika,
G for negligence in handling the sale and purchase of the land.

[6] After a full trial, the learned High Court Judge allowed the respondents claim and made an order in terms of the prayers as per the statement of claim dated 13 March 2006. The learned High Court Judge held that:

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> In the present case, there is no dispute that the defendants had been dealing with the forger in getting themselves registered as legal owners and in applying the deferred indefeasibility concept, I have no option but to hold that the title of the defendants to the property to be defeasible.

I **[7]** However, it is also the finding of the High Court that the appellants were *bona fide* purchasers for value without notice.

[8] In dismissing the claim against the third party, the High Court Judge held that: A

> ... the third party owes no duty of care be it in tort or contract to the defendants. In tort, there is no relationship of proximity between the third party and the defendants. In contract, the defendants had no retainer with the third party. The only person who had relationship of proximity and a retainer with the defendants is DW2 and he is not a party to this suit, the Court is prohibited from making any finding on that relationship. B

Proceedings In The Court of Appeal

[9] Aggrieved by the decision of the High Court, the appellants appealed to the Court of Appeal. In dismissing the appellants' appeal, the Court of Appeal made the following findings: C

> However we would state at this juncture that the learned Judge had applied the correct standard of proof in this case which is that on balance of probability it is for the respondents to prove their case which is grounded on forgery. This principle was stated in very clear terms by the then Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, 188. The learned Judge was also correct in accepting the unchallenged evidence of the experts PW10 and PW11 called by the respondents to corroborate the direct evidence by the respondents that the respondents themselves did not sign the impugned power of attorney. On this issue the learned Judge wrote in his judgment as follows: D E
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> > In my view there is direct evidence from the plaintiffs themselves that they did not sign the power of attorney which had been corroborated by the unchallenged evidence of the experts called by the plaintiffs in PW10 and PW11. It can be said that the expert reports had been quite unequivocal in stating that the plaintiffs did not sign the relevant documents. And when they are not challenged in any way by the defendants, the court though not bound by the opinions of the expert should accept the evidence unless cogent reasons are provided. Here no cogent reasons had been produced by the defendants; hence I have no hesitation in accepting the evidence of the experts. F G
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> We fully endorsed the above views by the learned Judge.

[10] It is pertinent to note that although the Court of Appeal agreed with the learned High Court Judge on the finding of facts that the power of attorney used as authority to transfer the land to the appellants was a forged instrument, it disagreed with the application of the concept of deferred indefeasibility to s. 88 of the Sabah Land Ordinance (SLO). The Court of Appeal held: H

> ... from the judgment of Edgar Joseph Jr FCJ in *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad* (*supra*) it is clear that there is no provision in the Sabah Law Ordinance conferring indefeasibility of title to I

A or interests in land, though the importance of registration in passing valid title or interests to the registered owner is recognised under s. 88 of the Ordinance.

[11] As regard the appellants' claim against the third party, the Court of Appeal agreed with the finding of the High Court and hence the appeal by B the appellants was accordingly dismissed. This is not an issue before us.

The Issues Before This Court

Question 1: Whether Bona Fide Purchasers For Value And Without Notice, Obtained Good Title To Land Immediately Upon Registration Of The Transfer C *Under s. 88 Of The Land Ordinance (Sabah Cap. 68) ("Land Ordinance") And Is Therefore An Indefeasible Registered Interest In Land?*

Appellants' Submission

[12] Learned counsel for the appellants submitted that the appellants, as *bona fide* purchasers for value without notice, obtained good title to the land D by way of registration under s. 88 of the SLO. It follows therefore, by reasons of registration of their interest in the land, the appellants had received an immediate indefeasible registered title in the land. By virtue of the registration of the appellants as the registered owners of the land, the respondents were divested of the title or ownership to the land.

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[13] It was implored upon us that s. 88 of the SLO should be interpreted according to the intention of Parliament to ensure justice and fairness to the appellants. The appellants argued that s. 88 in its plain meaning emphasises on the importance of registration as the pre-condition for validity of any new title or claim to or interest in any land. It constitutes the basic concept of *Torrens* F system in which title to or interest in land vests and divests upon registration. In support, the appellants relied on *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad* [1996] 2 CLJ 561; [1996] 2 MLJ 12.

[14] On the effect of registration of the *Torrens* title, learned counsel for the G appellants referred us to an Australian case of *Breskvar v. Wall* [1971] HCA 70; 126 CLR 376 where Barwick CJ in delivering the judgment of the court observed:

> The *Torrens* system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration & It is H the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.

[15] Learned counsel for the appellants further submitted that the I Malaysian courts recognise the concept of immediate indefeasibility to the title upon registration and thus, giving the true meaning of s. 88 of the SLO

and the spirit of *Torrens* system. He cited a High Court case of *Tan Sri William Cheng Heng Jem & Anor v. Tan Sri Ngan Ching Wen & Ors* [2012] 1 LNS 1196; [2013] 8 MLJ 417 where it was held that:

> A primary registration of a first Torrens title upon alienation grants to the registered owner a title that is immediately indefeasible as expressly provided in s. 92 of the NLC and s. 88 of the SLO, and as judicially interpreted in the case of *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 MLJ 12, at 20A and 26B-E.

The court further held that:

> Hence in the case of the Sabah Land, the registration of the title in the Sabah Land in D8's name by the Sabah State Authority pursuant to s. 48/57 SLO under the relevant state leases vests conclusively in D8 the legal and beneficial ownership in the Sabah Land which is immediately indefeasible against the whole world.

[16] It is further submitted that the rules of equity and good conscience offer the protection to the appellants being the *bona fide* purchasers for value without notice of their title against adversarial claim although the instrument used to give effect to the transfer was forged. He relied on the case of *Ngui Yu Thau v. Wong Mu Khyun & Ors* (No 2) [2003] 6 CLJ 273, where Richard Malanjum J (as His Lordship then was), observed that no one derives good title, right or interest from or through a forged instrument unless he satisfied the doctrine of *bona fide* purchasers for value and without notice. It is contended that in the present case it is proven that the appellants are *bona fide* purchasers for value without notice.

Respondents' Submission

[17] For the respondents, it was contended that the SLO is not an absolute *Torrens* system but a modified *Torrens* system of land registration. The respondents submitted that s. 88 of the SLO does not incorporate the principle of indefeasibility either immediate or deferred, of title or interests in land, on registration. On the contrary, such provision on indefeasibility of title is expressly defined under s. 340 of the National Land Code (NLC) and s. 31 of the Sarawak Land Code. In support, the respondents referred to the case of *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad* (*supra*).

[18] It was further submitted that s. 5 of the NLC defines purchaser as "persons or body who in good faith and for valuable consideration acquires title to or any interest in land". Further the proviso to s. 340(3) of the NLC made special exception in regard to *bona fide* purchasers for value without notice. Both provisions are absent in the SLO. Thus, there is nothing under s. 88 of the SLO to safeguard the interest of person who obtained title in good faith through a void instrument.

[19] The respondents contended that as the instrument to effect the transfer is void, it conveys no valid title or interest in the land to the appellants unless there is statutory intervention under the SLO like s. 340(3) of the NLC. In support, learned counsel for the respondents referred this court to the passage by Gopal Sri Ram JCA (as His Lordship then was) in *Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17; [1997] 2 MLJ 62, which was also referred to by both the courts below which reads:

> ... it is axiomatic that a forged instrument is null and void and of no effect ... It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument. (see page 85 of the judgment)

[20] The respondents also relied on the Federal Courts case in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1, where this court ruled:

> It was not in dispute that the two charges registered in favour of the third respondent were based on void instrument as they were not executed by the appellant. It therefore followed that the two charges in this case were liable to be set aside under section 340(2)(b) since they were based on void instrument. As the 3rd respondent was an immediate holder of these charges it could not take advantage of the proviso of section 340(3) of the NLC. The fact that the 3rd respondent acquired the interest in question in good faith for value was not in issue because the charges arose from void instrument. It automatically followed that such charges were liable to be set aside at the instance of registered proprietor namely, the appellant.

[21] It was also the respondents' submission that the appellants' reliance on *Ngui Yu Thau v. Wong Mu Khyun & Ors (No 2)* (*supra*) was erroneous in the context of s. 88 which does not provide for the concept of indefeasibility of title. If the appellants' argument is accepted, it would mean that any *bona fide* purchaser for value who gets his name registered on the land register cannot be removed for any reason whatsoever even if the registration was obtained through a forged instrument.

[22] Learned counsel for the respondents submitted that the concept of *bona fide* purchaser for value without notice only applies as an exception to the common law rule if the vendor has a defective title. In the present case, the vendor's title is not defective but the instrument of conveyance is defective. Thus, the respondents contended that the concept of *bona fide* purchaser for value without notice has no application in the present case. In support of his argument, learned counsel referred this court to the case of *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294.

[23] The respondents further submitted that even if the appellants were not involved in the act of forgery as claimed by the appellants, this will not in any way assist the appellants. The appellants, being the purchasers should have taken reasonable steps to make the necessary inquiry and to ensure that

the instrument ie, power of attorney, relied upon by the appellants is valid and genuine. Thus, the appellants have themselves to blame and to bear the consequences arising from their own negligence. In his submission, learned counsel for the respondents stated that this is consistent with the legal maxim "*caveat emptor*" ("let the buyer beware").

Our Finding

[24] In the present case it was a finding of fact by the High Court that the appellants were *bona fide* purchasers for value and without notice. It was also the finding by the High Court that the instrument used to effect the transfer of the said land was forged. These findings of fact by the High Court were never challenged in the Court of Appeal. Thus, the question arises whether, the appellants, being a *bona fide* purchasers for value and without notice can obtain a good title to the land upon registration under s. 88 of SLO notwithstanding the fact that instrument of transfer was forged. It should be noted that the law governing the administration of land in Sabah is different from the law applicable in Peninsular Malaysia. In Peninsular Malaysia, the relevant law is the NLC.

[25] The concept of indefeasibility of title is incorporated in s. 340 of the NLC. The section reads:

Section 340.

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible -

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) -

(a) it shall be liable to be aside in the hands of any person or body to whom it may subsequently to be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.

A

> Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

[26] For better understanding of the concept of indefeasibility, the B analytical framework of s. 340 of NLC is discussed in brief. Section 340 introduced the concept of indefeasibility of title following the *Torrens* system. Section 340(1) sets out the general principle that the proprietor in whose favour registration has been effected will obtain an indefeasible title to or interest in the land. In other words upon registration of a title, it confers an C indefeasible title to the owner whose name is registered. It is a system that operates on the principle of "title by registration". By indefeasibility, it means, "the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys" (see *Frazer v. Walker* [1967] 1 All ER 649).

D **[27]** The indefeasibility of title or interest so acquired under s. 340(1), however, is liable to be set aside under s. 340(2) where it has been obtained by, *inter alia*, fraud or forgery. Thus, based on the concept of conclusive proof of registration, anyone, including those who had successfully registered the land by unlawful means, their title could not also be defeated unless if E it is shown that the transfer was tainted with fraud or forgery as provided in s. 340(2). In the case of fraud, s. 340(2)(a) provides for the title or interest obtained to be defeasible where the proprietor or his agent is a party or privy to the fraud. In the case of forgery, s. 340(2)(b) provides for the title or interest so acquired by the proprietor or transferee immediately to the forgery to be defeasible and liable to be set aside. Thus, the title is subject F to challenge and can be defeated although the proprietor or transferee acted in good faith in acquiring the title or interest. The section differentiates between title obtained through forgery or fraud. In the case of forgery, there is no requirement that the proprietor or transferee to be a party to the forgery but he must be a party or privy in the case of fraud.

G **[28]** In the circumstances where the title or interest is subsequently transferred, s. 340(3) provides that the subsequent proprietor or transferee will similarly obtained a defeasible title or interest. However, where the subsequent proprietor or transferee acts in good faith and gives valuable consideration for the title or interest in question, the proviso to s. 340(3) H confers protection on such a subsequent proprietor or transferee such that his title or interest will be indefeasible. In effect, s. 340 introduces what is called the concept of deferred indefeasibility (*Tan Ying Hong v. Tan Sian San & Ors* (*supra*)).

I **[29]** Section 88 of the SLO on the other hand does not incorporate the concept of indefeasibility of title as found in s. 340 of the NLC. For ease of reference, s. 88 of SLO is reproduced below:

Section 88.

No new title and no dealing with, claim to or interest in any land except, land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provision of this Part.

[30] From the plain reading of s. 88 of the SLO, we find there exists a lacuna in this provision when compared with s. 340 of the NLC which embodies the concept of indefeasibility of title. Registration under the SLO does not confer indefeasibility of title, deferred or immediate. We are of the view that in the absence of statutory intervention in the like of the proviso to s. 340(3), there is no protection afforded to the *bona fide* purchaser for value without notice such as the appellants in the present case. Therefore, with respect, we differ from the view expressed by Richard Malanjum J in *Ngui Yu Thau v. Wong Mu Khyun & Ors (No 2)* (*supra*), at p. 289 where he stated:

Thus in Sabah with specific reference to land the principle as enunciated by the Federal Court in *Adorna Properties Sdn Bhd* (*supra*) applies notwithstanding the lacuna in the Ordinance. In other words no one derives good title, right or interest from or through a forged instrument unless he satisfied the doctrine of *bona fide* purchaser for value and without notice.

[31] We are of the view that s. 88 of the SLO must be considered on its own without being unnecessarily influenced by the provisions of the NLC because they are poles apart. Section 88 of the SLO merely deals with the registration of new title, dealing with claim to or interest in any land, other than land held under native customary tenure without documentary title. It requires such title or dealing, etc. to be registered for it to be valid under the SLO. In other words, it does not deal with the issue of defeasibility or indefeasibility of title as contained in s. 340 of NLC.

[32] The fact that the names of the appellants found their way on the register of title does not automatically confer on the appellants an indefeasible title. In other words, it is open to enquiry as to how the appellants got themselves registered as owners of the land. That was precisely what the courts below did in the present case and came to the conclusion that the appellants could not get valid title to the land on the ground that the power of attorney which was used as authority to transfer the land was a forgery. In its judgment the Court of Appeal stated:

... in this case that the power of attorney that was used as authority to transfer the said land to the appellants is a forgery, we agree with the learned trial judge that the title of the appellants to the property is defeasible and that the appellants could not have acquired a valid title to the said land though the land has been registered in the name of the appellants.

[33] We agree with the finding of the courts below that the instrument of transfer in the present case was an invalid or void instrument of transfer as it was executed on the authority of a forged power of attorney, therefore, it could not give rise to a valid title in law and the SLO does not seek to give validity to such a title even though the appellants were *bona fide* purchasers for value without notice. There is nothing in the SLO giving protection to such purchasers. Such statutory protection must be expressly provided in the SLO (*Gibbs v. Messer* [1891] AC 248).

[34] The above finding by the Court of Appeal found support in the common law rule of *Nemo Dat Quod Non Habet* (*nemo dat* rule in short). The *nemo dat* rule literally means "no-one can transfer what he has not got" (*Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd* [1949] 1 KB 322 as per Denning LJ). This is sometimes called the "derivation" principle: the transferee's rights derived from those of the transferor. The *nemo dat* rule protects the true owner of the goods (right of ownership) and the innocent purchaser who purchases the goods from non-owner gets no title as the non-owner could not pass good title because he has none. In other words, the right of the true owner is retained in the event of his possession is being stolen or sold to the unsuspecting purchaser. In a typical case, the application of *nemo dat* rule involves the seller who does not own the goods has no right to sell them but nevertheless sells them to an innocent buyer. Because of the apparent harshness of the *nemo dat* rule (as it is an innocent buyer who is a *bona fide* purchaser for value without notice stands to lose out), several exceptions to *nemo dat* rule were developed at common law and also have been added by statute (Sale of Goods Act 1957). One of the exceptions to *nemo dat* rule is when the innocent purchaser pleads estoppel by asserting that the statement and conducts of the true owner have led him to believe that the unauthorised seller in fact had the right to sell the goods (s. 27(1) of the Sale of Goods Act 1957).

[35] We are of the view that the *nemo dat* rule is equally applicable in the present case which involves the transfer of title under s. 88 of the SLO (*M & J Frozen Food Sdn Bhd v. Siland Sdn Bhd & Anor* (*supra*)). Applying the *nemo dat* rule to the present case, we hold that the forgers could not pass good title to the appellants (*Boonsoom Boonyanit v. Adorna Properties Sdn Bhd (supra)*). Thus, we conclude that a mere claim of being a *bona fide* purchaser for value without notice is not sufficient to avoid the application of the *nemo dat* rule which renders the appellants' title to the land liable to be set aside at the instance of the respondents who are the rightful owners.

[36] In the result, we affirm the finding of the Court of Appeal and the High Court that the appellants could not obtain a good title to the said land as it is defeasible and liable to be set aside on the ground that it was obtained under a void or invalid instrument of transfer. Thus, our answer to the first question is in the negative.

Question 2: Whether The Concept Of Deferred Indefeasibility As Adopted In Tan Yin Hong v. Tan Sian San & Ors [2010] 2 CLJ 269, Which Was A Case Based On s. 340 Of The National Land Code Should Be Distinguished From The Interpretation Of s. 88 Of The Land Ordinance Since There Is No Similar Provision In The Land Ordinance?

[37] Having discussed s. 340 of the NLC and s. 88 of the SLO, it is clear that they are two distinct provisions. Section 88 of SLO only makes provision in regard to registration of title. It does not incorporate the concept of indefeasibility as found under the NLC. In the present case, the appellants are the immediate holder of the title which was obtained by or under a forged instrument of transfer, therefore, their title is open to challenge and be set aside at the instance of the respondents who were the true owners. It is thus erroneous to interpret s. 88 of SLO as to confer upon *bona fide* purchaser for value without notice an indefeasible title or interest in the land upon registration.

[38] For the reasons given, our answer to the second question is in affirmative.

Conclusion

[39] Based on the above, we agree with the High Court as affirmed by the Court of Appeal that appellants' title must in the circumstances be set aside. Accordingly, we dismiss the appeal with costs.